BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

| JOHN D. GLADFELTER |) | |
|--|-------------|----------------------|
| Claimant |) | |
| VS. |) | Docket No. 1,052,877 |
| SHERWIN WILLIAMS Self-Insured Respondent |))) | |
| |) | |

ORDER

Respondent requests review of the November 16, 2010 preliminary hearing Order entered by Administrative Law Judge John D. Clark (ALJ).

ISSUES

On November 16, 2010, a preliminary hearing was held at claimant's request. At issue was claimant's request for a change of treating physician and temporary total disability (TTD) benefits. During this preliminary hearing the respondent specifically admitted a work-related accident occurred on January 26, 2010.¹ After hearing the evidence offered by the parties the ALJ authorized Dr. Paul Stein to perform an independent medical examination (IME) of the claimant to determine if he is in need of additional medical treatment and to issue a rating and restrictions if no treatment is necessary. The ALJ also ordered temporary total disability to be paid beginning September 22, 2010 and continuing until claimant is released.²

The respondent requests review of this Order. Although the respondent's application for review lists the single issue to be determined as "[w]hether claimant met with personal injury by accident arising out of and in the course of his employment with respondent", its brief does not advance any such argument. Rather, respondent argues

¹ P.H. Trans. at 4.

² ALJ Order (Nov. 16, 2010).

that 1) the ALJ should not have ordered an IME in the absence of any evidence that claimant requires additional treatment and 2) that TTD should not have been ordered.³

Claimant argues that the Board should dismiss respondent's appeal for lack of jurisdiction and/or affirm the ALJ's Order in its entirety.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Although respondent asserts a jurisdictional basis for its appeal,⁴ its complaint is wholly without merit given the uncontroverted fact that **respondent has admitted claimant suffered a compensable injury on January 26, 2010**. Failing that, respondent goes on to argue that the ALJ should not have awarded TTD benefits.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.⁵ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.⁶

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a

³ Respondent's Brief at 1 (filed Dec. 17, 2010)1.

⁴ Appeal of Preliminary Hearing Order at 1 (filed Nov. 23, 2010).

⁵ K.S.A. 2009 Supp. 44-551.

⁶ Carpenter v. National Filter Service, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁷

In sum, an ALJ has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. The Board has no jurisdiction to hear this dispute and therefore, respondent's appeal of that portion of the ALJ's decision is dismissed.

Similarly, the Board has no jurisdiction to hear respondent's complaint with respect to the ALJ's decision to appoint a physician to conduct an IME examination for purposes of determining whether claimant is in need of additional treatment. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment. And absent an allegation that the ALJ exceeded his jurisdiction, this Board is without the power to address appeals from such preliminary hearing matters.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁸ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the respondent's appeal of the Order of Administrative Law Judge John D. Clark dated November 16, 2010, is dismissed.

Dated this _____ day of January 2011. JULIE A.N. SAMPLE BOARD MEMBER

c: Paul V. Dugan, Attorney for Claimant
Robert G. Martin, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

IT IS SO ORDERED.

⁷ Allen v. Craig, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁸ K.S.A. 44-534a.